Supreme Court, U.S.
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No. ———

In The

Supreme Court of the United States

LAWRENCE CHARLES BOWMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. § 3006A, Historical & Statutory Notes, authorizes a court to award attorney's fees and costs to a criminal defendant if the court finds that the position of the United States was vexatious, frivolous, or in bad faith. The court may receive evidence *ex parte* and *in camera* for good cause shown to determine whether or not to award fees and costs.

I. Whether a "frivolous position" under the Hyde Amendment is one where the government lacked either a reasonable basis or a reasonable expectation of attaining sufficient material evidence by the time of trial.

II. Whether 18 U.S.C. § 3006A imposes on the defendant the burden to prove a substantive violation of the Hyde Amendment in order to meet the "for good cause" discovery standard.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions	1
Statement of the Case	3
Reasons Relied On For Allowance Of The Writ	5
I. A "frivolous position" under the Hyde Amendment is one where the government lacked either a reasonable basis or a reasonable expectation of attaining sufficient material evidence by the time of trial	5
II. 18 U.S.C. § 3006A does not impose the burden on defendant to prove a substantive violation of the Hyde Amendment in order to meet the "for good cause" discovery standard	10
Conclusion	14
Appendices	
Appendix A — United States v. Bowman, 380 F.3d 387, No. 03-4044 (8th Cir. 2004)	App. 1
Appendix B — United States v. Bowman, No. 4-03-CR-40 (S.D. Iowa Dec. 1, 2003), Order denying Application for Attorney Fees and Costs	App. 9
Appendix C — United States v. Bowman, No. 4-03-CR-40 (S.D. Iowa Dec. 11, 2003), Order denying Motion to Reconsider	App. 15

TABLE OF CONTENTS – Continued

Page

Appendix D Letter to the government from Alfredo Parrish, dated July 18, 2003 .....App. 16

Appendix E Letter to the government from Alfredo Parrish, dated August 22, 2003.....App. 18

TABLE OF AUTHORITIES

Page

CASES

Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) 6

In re 1997 Grand Jury, 215 F.3d 430 (4th Cir. 2000) 6, 7

United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) 11

United States v. Aubrey, 290 F. Supp. 2d 1215 (D. Mont. 2003) 12

United States v. Beeks, 266 F.3d 880 (8th Cir. 2001) 6, 7

United States v. Bowman, 380 F.3d 387 (8th Cir. 2004) ..... *passim*

United States v. Bowman, No. 4-03-CR-40 (S.D. Iowa Dec. 1, 2003) 1

United States v. Braunstein, 281 F.3d 982 (9th Cir. 2002) 6

United States v. Gardner, 23 F. Supp. 2d 1283 (N.D. Okla. 1998) 10, 12, 13

United States v. Gilbert, 198 F.3d 1293 (11th Cir. 1999) 6, 7

United States v. Heavrin, 330 F.3d 723 (6th Cir. 2003) 6, 7, 9

United States v. Knott, 256 F.3d 20 (1st Cir. 2001) 5

United States v. Lindberg, 220 F.3d 1120 (9th Cir. 2000) 12

United States v. Schneider, 289 F. Supp. 2d 328 (E.D.N.Y. 2003) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

FEDERAL RULES OF CRIMINAL PROCEDURE 5(c)(3)(D)(ii) 8

United States Supreme Court Rule 10 ..... 10, 14

United States Supreme Court Rule 13 1

United States Supreme Court Rule 14 3

18 U.S.C. § 3006A ..... *passim*

21 U.S.C. § 846 3

21 U.S.C. § 863 3

28 U.S.C. § 1254 1

28 U.S.C. § 2412 ..... 2, 7

OTHER AUTHORITIES

143 CONGRESSIONAL RECORD 7791 (1997) 7, 8

BLACK'S LAW DICTIONARY (6th ed. 1990) 6

OPINIONS BELOW

The Order by the Honorable Ronald E. Longstaff of the United States District Court for the Southern District of Iowa, *United States v. Bowman*, No. 4-03-CR-40 (S.D. Iowa Dec. 1, 2003), which denied Petitioner's Application for Attorney Fees, is contained in Appendix B.

Petitioner appealed and the opinion of the United States Court of Appeals for the Eighth Circuit, *United States v. Bowman*, 380 F.3d 387, No. 03-4044 (8th Cir. 2004), affirming the district court denial, is contained in Appendix A.

JURISDICTION

The judgment sought to be reviewed was entered August 24, 2004, in the United States Court of Appeals for the Eighth Circuit. *United States v. Bowman*, 380 F.3d 387, No. 03-4044 (8th Cir. 2004) (Appendix A).

The above-captioned Petition for Writ of Certiorari is timely submitted pursuant to United States Supreme Court Rule 13(1) and (3).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. § 3006A, Historical & Statutory Notes, provides as follows:

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

STATEMENT OF THE CASE

Basis for federal jurisdiction in the United States Court of Appeals for the Eighth Circuit (Sup. Ct. Rule 14.1(g)(ii)) and facts material to consideration of the questions presented (Sup. Ct. Rule 14.1(g)):

Petitioner, Lawrence Charles Bowman, was charged by Indictment on February 12, 2003, in the United States District Court for the Southern District of Iowa, criminal number 4-03-CV-40, with one (1) count of conspiracy to sell drug paraphernalia in violation of 21 U.S.C. §§ 846, 863(a), eight (8) counts of selling drug paraphernalia in violation of 21 U.S.C. § 863(a)(1) and one (1) count of forfeiture. (App. A, at p. 1).[1] Petitioner faced a possible sentence of twenty-seven years if served consecutively, *see* 21 U.S.C. § 863(b), as well as the loss of personal property. 21 U.S.C. § 863(c).

Petitioner was arrested near Sacramento, California. (App. B, at p. 9). The arrest warrant contained no identifying information of Petitioner other than his name, Lawrence Charles Bowman. *Id.* The United States District Court for the Eastern District of California conducted an initial appearance of Petitioner on March 3, 2003. (App. A, at p. 2). Petitioner waived an identity hearing. *Id.*

Petitioner was instructed to appear on March 10, 2003, at the United States District Court in Des Moines, Iowa, for an arraignment. (App. B, at p. 9). Petitioner waived a personal appearance on March 7, 2003, and entered a plea of not guilty on March 10, 2003. (App. B, at

[1] Citations are to the relevant appendix and page number.

pp. 9-10). Petitioner's counsel entered an appearance on March 24, 2003. (App. A, at p. 2).

Petitioner advised the government by letter on July 18, 2003, that there was insufficient evidence to establish that Petitioner was the individual in question. (App. D, at p. 1). Petitioner further requested photographs to support the government's position. *Id.* Petitioner again raised the issue with the government by letter on August 22, 2003, advising that all of Petitioner's whereabouts had been accounted for on the dates the alleged misconduct occurred, except one date that was still being confirmed at that time. (App. E, at p. 1). Petitioner asked the government to drop all charges. (App. E, at p. 1). Petitioner continued to prepare for trial in the event that the government declined to dismiss the case. Chief Judge Longstaff ordered the case dismissed upon the government's request on October 1, 2003. *Id.* The government proceeded to indict the correct defendant, one Lawrence *Carl* Bowman. *Id.*

Petitioner filed a request for attorney's fees and costs under the Hyde Amendment, 18 U.S.C. § 3006A, on October 23, 2003, arguing that the government's prosecution was frivolous. (App. B, at p. 9). Petitioner further argued that good cause existed to hold an *ex parte* and *in camera* hearing to determine when the government knew the Petitioner's identity was an issue. (App. B, at p. 12). Chief Judge Longstaff denied Petitioner's request for attorney's fees on December 1, 2003, finding that the government acted reasonably upon learning that Petitioner's identity was an issue. (App. B, at p. 14). Judge Longstaff also denied an *ex parte* hearing because Petitioner waived an identification hearing and therefore lacked good cause. (App. B, at p. 13). Petitioner filed a

motion for reconsideration which was denied on December 11, 2003. (App. C, at p. 15).

Petitioner filed a Notice of Appeal to the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the district court decision on August 24, 2004. *United States v. Bowman*, 380 F.3d 387, No. 03-4044 (8th Cir. 2004) (Appendix A).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. A "frivolous position" under the Hyde Amendment is one where the government lacked either a reasonable basis or a reasonable expectation of attaining sufficient material evidence by the time of trial.

A split among the courts of appeal requires the Supreme Court to determine the meaning of frivolous within the context of the Hyde Amendment.[2] Petitioner urges this Court to adopt the definition elucidated by the Sixth Circuit, which defines a frivolous position as: "one lacking a reasonable legal basis or where the government lacks a

[2] As discussed herein, the Fourth, Eighth, Ninth, and Eleventh Circuits have adopted a definition of frivolous that not only encompasses the common understanding of frivolousness, but also incorporates concepts of vexatiousness. The Sixth Circuit, on the other hand, recognizes that while the definitions of frivolous and vexatious may overlap in meaning, Congress intended the word frivolous to have a separate and distinct meaning from vexatious. Finally, the First Circuit's position is unclear as it does not cite to any authority in its definition of frivolous. *United States v. Knott*, 256 F.3d 20, 29-30 (1st Cir. 2001) (defining frivolous as "without any foundation or basis for belief that it might prevail").

reasonable expectation of attaining sufficient material evidence by the time of trial." *United States v. Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003). In direct conflict with the Sixth Circuit, the Eighth Circuit defines a position as frivolous when it is "utterly without foundation in law or fact." *United States v. Bowman*, 380 F.3d 387, 390 (8th Cir. 2004); *United States v. Beeks*, 266 F.3d 880, 884 (8th Cir. 2001).

Under the Hyde Amendment a criminal defendant is entitled to attorney's fees and other litigation expenses "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A. The statute does not define the terms vexatious, frivolous, or in bad faith. *Heavrin*, 330 F.3d at 728; *United States v. Braunstein*, 281 F.3d 982, 994 (9th Cir. 2002). Although words not defined in a statute "must be accorded their ordinary meaning," *Heavrin*, 330 F.3d at 728 (citing *Chapman v. United States*, 500 U.S. 453, 462, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)), the circuit courts have issued conflicting definitions.

Three courts of appeal have adopted the definition of frivolous as stated in Black's Law Dictionary. *Braunstein*, 281 F.3d at 995; *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000); *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999). The Eleventh Circuit was the first circuit to define a "frivolous action" as "one that is '[g]roundless . . . with little prospect of success; often brought to embarrass or annoy the defendant.'" *Gilbert*, 198 F.3d at 1299 (citing BLACK'S LAW DICTIONARY 668 (6th ed. 1990)). The Ninth and Fourth Circuits joined in the Eleventh Circuit definition of frivolous. *Braunstein*, 281 F.3d at 995 (joining the Fourth Circuit in adopting the Eleventh Circuit's definition of frivolous); *In re 1997*

Grand Jury, 215 F.3d at 436 (citing definition adopted by the Eleventh Circuit).

The Eighth Circuit has also followed the definition advanced by the Eleventh Circuit, by stating that a frivolous position is one that is "so utterly without foundation in law or fact as to be frivolous." *Beeks*, 266 F.3d at 884 (citing *Gilbert*, 198 F.3d at 1299). In *United States v. Bowman*, the Eighth Circuit purported to follow the First Circuit and Sixth Circuit definitions of frivolous. 380 F.3d at 390-91. However, this is clearly not the case as the Sixth Circuit sought to clarify its definition from that of the Eleventh Circuit, stating:

> At this juncture, we feel compelled to more precisely explicate the difference between the words 'frivolous' and 'vexatious' because *Gilbert's* definition of 'frivolous' is similar to this court's definition (albeit in dicta) of 'vexatious'. . . . Although there is undoubtedly an overlap in the meaning of the two words, the term 'vexatious' embraces the distinct concept of being brought for the purpose of irritating, annoying, or tormenting the opposing party.

Heavrin, 330 F.3d at 729. Therefore, the Eighth Circuit may claim to follow the Sixth Circuit but in actuality it follows the Eleventh Circuit's definition, in direct conflict with the Sixth Circuit's definition.

The legislative history of the Hyde Amendment does not support such a stringent definition as urged by the courts following the dictionary definition. Senator Hyde initially proposed that this provision mirror the Equal Access to Justice Act, 28 U.S.C. § 2412, requiring the government to demonstrate that it was "substantially justified" in bringing the suit. 143 CONG. REC. 7791 (1997).

Ultimately Congress determined that the criminal defendant must show that the prosecution was vexatious, frivolous or in bad faith. 18 U.S.C. § 3006A. Senator Hyde stated:

> What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled.

143 CONG. REC. 7791 (1997). Thus the burden is on the Petitioner, but should not be so onerous as to preclude a criminal defendant from ever being awarded attorney's fees and costs.

In the case *sub judice*, the district court emphasized that Petitioner failed to raise his identity as an issue in the early stages of the proceedings. (App. B, at pp. 12, 13). Petitioner did waive an identity hearing at his initial appearance, (App. B, at p. 9), but an identity hearing only requires the judge to determine that "the defendant is the same person named in the indictment." FED. R. CRIM. P. 5(c)(3)(D)(ii). An identity hearing would have simply confirmed that Petitioner was charged by his true name, Lawrence Charles Bowman, although the government was actually seeking one Lawrence *Carl* Bowman.

The Eighth Circuit and the district court suggest that a person truly protesting his innocence would have raised this issue earlier by requesting an identity hearing or by personally appearing for his arraignment in Iowa. *See Bowman*, 380 F.3d at 391; *see also* (App. B, at p. 13). This

reading of the record neglects the fact that Petitioner was not, in fact, a drug conspirator and therefore did not have knowledge of the criminal justice system nor did he have funds readily available with which to travel to Iowa for an arraignment with one week's notice. Furthermore, it would not be unusual for an attorney representing a criminal defendant to hear protestations of innocence from a client. Thus, Petitioner engaged in trial preparation and sought continuances as necessary, in addition to undertaking an investigation of the flaws in the government's case. Moreover, there was extensive discovery to review in this case, which the government did not provide until two months after arresting Petitioner.

Under the Sixth Circuit test for frivolous, "one lacking a reasonable legal basis or where the government lacks a reasonable expectation of attaining sufficient material evidence by the time of trial," Petitioner can demonstrate that the government's position in the case *sub judice* was frivolous. *See Heavrin*, 330 F.3d at 729. As trial approached, counsel for co-defendant Alan Clute advised Petitioner's counsel that Petitioner did not meet the correct description, Petitioner established alibis for the dates in question in the Indictment, and Petitioner advised the government on two occasions that identity was an issue. (App. A, at pp. 2-3). For these reasons, the government lacked a reasonable expectation of attaining sufficient material evidence by the time of trial. *See Heavrin*, 330 F.3d at 729. At a minimum, Petitioner should be entitled to a hearing in the district court on his application for attorney's fees and costs pursuant to the Hyde Amendment.

Applying the Sixth Circuit analysis in *Heavrin*, Petitioner is entitled to attorney's fees and costs because

the government lacked a reasonable expectation of attaining sufficient material evidence by the time of trial. The Eighth Circuit's adoption of the "utterly without foundation in law or fact" definition of frivolous constitutes a decision in conflict with another circuit under United States Supreme Court Rule 10(a), amounting to a compelling reason for the granting of Petitioner's Petition for Writ of Certiorari.

II. 18 U.S.C. § 3006A does not impose the burden on defendant to prove a substantive violation of the Hyde Amendment in order to meet the "for good cause" discovery standard.

In part, the Hyde Amendment grants the district court broad authority to receive evidence, including classified evidence, possessed by the government *ex parte* and *in camera*. *United States v. Gardner*, 23 F. Supp. 2d 1283, 1296 (N.D. Okla. 1998). On this point, the Hyde Amendment provides:

> [t]o determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal.

18 U.S.C. § 3006A.

As is self-evident, in order to establish that government prosecutors engaged in wrongful conduct, whether

such conduct is deemed improper under the Hyde Amendment or the Constitution, it may become necessary to examine evidence and information possessed by the government. *See e.g., United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) (discussing defendant's right to discovery in asserting selective-prosecution defense to criminal prosecution). This principle is the common-sense reflection that rarely is improper conduct undertaken openly and in public view. This is especially true in Hyde Amendment cases, in which the moving party must establish the criminal prosecution itself "was vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A. Rarely, if ever, will government prosecutors commit such acts publicly; rather, by the very nature of the proceeding, the only likely evidence of such wrongful conduct will exist within the government's own files and records.

Quite likely in response to these principles, Congress authorized the right of discovery in Hyde Amendment litigation. *See id.* As evidence of its intent to allow for broad discovery in these cases, Congress authorized discovery simply upon a showing of "good cause" – perhaps to avoid the more rigorous discovery standards imposed by the courts in similar prosecutorial misconduct situations. *Compare* 18 U.S.C. § 3006A (allowing discovery for "good cause") *with Armstrong*, 517 U.S. at 468, 116 S. Ct. at 1488 (imposing "rigorous standard for discovery").

Despite Congress's intended broad discovery right, federal courts reviewing the "good cause" language of the Hyde Amendment have imposed significant restrictions on a defendant's right to discovery, including the requirement that the defendant establish the validity of his or her underlying claim. Phrased differently, these courts have concluded that in order to establish the good cause necessary to allow

for discovery, the defendant must establish that the prosecution itself was vexatious, frivolous, or in bad faith.

Hyde Amendment litigants are placed in a no-win situation: not being able to produce the necessary proof to demonstrate a Hyde Amendment violation because such evidence is possessed by the government and not being afforded the opportunity to have the court examine the governmental evidence because the defendant has not forwarded sufficient proof of the Hyde Amendment violation. *See United States v. Lindberg*, 220 F.3d 1120, 1126 (9th Cir. 2000) (requiring the defendant to present evidence that the prosecution was "motivated by improper considerations" before allowing for good cause discovery); *United States v. Aubrey*, 290 F. Supp. 2d 1215, 1220 (D. Mont. 2003) (refusing to allowing discovery where defendant failed to establish "the government was motivated by improper considerations or an intent to harass"); *United States v. Schneider*, 289 F. Supp. 2d 328 (E.D.N.Y. 2003) (refusing to allow the good cause discovery where the defendant failed to present some evidence of discriminatory effect and intent).[3] Simply put, these federal courts

[3] Several of these courts justify the heightened discovery standard under the Hyde Amendment on the basis that the material sought may constitute attorney work product or may reveal prosecutorial trial strategies. Each of these justifications, however, is wholly without merit. Concerning trial strategies, in order to even raise a Hyde Amendment claim, the defendant must have prevailed in the prosecution. 18 U.S.C. § 3006A. Thus, in any Hyde Amendment discovery situation, no on-going trial against the defendant exists. Second, concerning work product, Congress recognized the invasive effect of such discovery and implemented appropriate protective measures (*i.e.*, *ex parte* and *in camera* review). *See Gardner*, 23 F. Supp. 2d at 1296 (recognizing that Congress implemented these procedures to "protect against the ill-effects of any such invasion").

impose the same requirement for seeking *in camera* and *ex parte* discovery as is required to establish a substantive violation of the Hyde Amendment.

In the case *sub judice*, the Eighth Circuit improperly followed the lead of these courts by requiring Petitioner to present proof "that the government acted without a basis to believe the charge could not be proven." *United States v. Bowman*, 380 F.3d 387, 390 (8th Cir. 2004). This standard for discovery is virtually the same standard utilized by the Eighth Circuit in adjudicating whether a substantive violation of the statute occurred. *See id.* at 391 (stating Petitioner could not succeed in establishing a Hyde Amendment violation because he "failed to show the prosecution was pursued without any reasonable foundation for the belief that the Government might prevail on the indictment"). In no uncertain terms, the Eighth Circuit impermissibly requires a litigant to prove the prosecution was vexatious, frivolous, or in bad faith to not only recover under the Hyde Amendment itself, but also as a condition precedent to effectuate discovery.

"[T]he Hyde Amendment vests in the Court both the responsibility and the authority to develop the facts in a manner warranted by the circumstances of the case for the purpose of determining whether the conduct of the United States was 'vexatious, frivolous, or in bad faith.'" *Gardner*, 23 F. Supp. 2d at 1296. The Eighth Circuit's requirement that such authority only be undertaken in situations where a defendant demonstrates a substantive violation is not only contrary to the intended purpose of the Hyde Amendment (*i.e.*, to provide a means of compensation for those who have been subjected to wrongful criminal prosecution) but also contrary to the very language of the statute. Because this Court has not determined the appropriate

analysis under the Hyde Amendment's "good cause" inquiry and because the lower federal courts are not uniform in their interpretation, a compelling reason exists for the granting of Petitioner's Petition for Writ of Certiorari under United States Supreme Court Rule 10(a).

CONCLUSION

For the foregoing reasons, Petitioner prays the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES

		Page
Appendix A	*United States v. Bowman*, 380 F.3d 387, No. 03-4044 (8th Cir. 2004)	App. 1
Appendix B	Order denying Petitioner's Application for Attorney Fees and Costs, *United States v. Bowman*, No. 4-03-CR-40 (S.D. Iowa Dec. 1, 2003)	App. 9
Appendix C	Order denying Motion to Reconsider, *United States v. Bowman*, No. 4-03-CR-40 (S.D. Iowa Dec. 11, 2003)	App. 15
Appendix D	Letter to the government from Alfredo Parrish, dated July 18, 2003	App. 16
Appendix E	Letter to the government from Alfredo Parrish, dated August 22, 2003	App. 18

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-4044

United States of America, Appellee, v. Lawrence Charles Bowman, Appellant.	* * * * * * * *	Appeal from the United States District Court for the Southern District of Iowa. [PUBLISHED]

Submitted: May 11, 2004
Filed: August 24, 2004

Before MURPHY and FAGG, Circuit Judges, and GOLDBERG,* Judge of the United States Court of International Trade.

PER CURIAM.

In February 2003 an Iowa grand jury indicted Lawrence Charles Bowman on federal drug charges. An arrest warrant was sent to California, where Bowman was living. The warrant did not describe Bowman or provide any

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* The Honorable Richard W. Goldberg, Judge of the United States Court of International Trade, sitting by designation.

identifying information other than his name. On March 3, 2003, Bowman was arrested in Sacramento, California. At his initial appearance there, Bowman was represented by appointed counsel and waived the opportunity for a hearing to determine whether he was the same person named in the indictment or warrant and thus show the Government charged the wrong person. *See* Fed. R. Crim. P. 5(c)(3)(D)(ii). Bowman was released on bond and directed to report to the Southern District of Iowa for arraignment a week later. Bowman waived his personal appearance at arraignment.

On March 24, 2003 Bowman retained Iowa counsel who entered an appearance. On May 22, 2003, Bowman filed a motion for continuance of trial, which the district court** granted. Finally, on July 18, 2003, more than four months after Bowman's arrest, Bowman's attorney sent the Government a letter stating:

> We have reviewed the discovery in the Bowman file. It appears that there is insufficient evidence to establish that my client . . . is the same individual in question with regard to the criminal activity outlined in the indictment. If you have other information that supports your identification in this matter, I would certainly appreciate receiving it. Further, if you have any photographs of any type that support your position, I would like to review [them].

Without waiting for a response to the letter, Bowman sought and received a second continuance later that month. In August, Bowman filed a notice of alibi, a motion

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** The Honorable Ronald L. Longstaff, Chief Judge, United States District Court for the Southern District of Iowa.

in limine, and notice of intent to use business records. He filed a trial brief and exhibit/witness list. Then, on August 22, Bowman's attorney sent the prosecutor a letter stating:

> We talked last week concerning a resolution of Mr. Bowman's case. As I have indicated to you in the past, we believe the government has the wrong person indicted in this case. As a matter of fact, I spoke with the co-defendant's attorney from Michigan. It was the third time that he and I had spoken about this issue. I asked him for a description from his client of what Mr. Bowman looked like. The description does not in any way match my client. . . . We have been able to document Mr. Bowman's whereabouts on each occasion when the government is alleging that he engaged in illegal conduct. . . . I am asking the government to drop all charges against Mr. Bowman and that it be done immediately. . . . Please review your file and let me know if you would like the photographs of Mr. Bowman in order that we can substantiate that he is not the same person who was in fact distributing drug paraphernalia around the United States.

The Drug Enforcement Administration (DEA) investigated and presented a photographic spread to a cooperating witness in mid-September. On September 23, 2003, the prosecutor was notified the witness could not identify Bowman as the person involved in the criminal activity. The next day, the Government informed defense counsel of its intent to drop the charges against Bowman and, at the Government's request, the district court dismissed the charges on October 1, 2003. The Government later determined the proper defendant was one Lawrence Carl Bowman.

Bowman then filed a request for attorney's fees under the Hyde Amendment, which authorizes federal courts to "award to a prevailing party [in a criminal case], other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C. § 3006A. Bowman asserted the Government's position had been frivolous, the Government knew of its mistake as early as March of 2003 or by July 2003 at the latest, and the Government's action or lack of action was not reasonable. Bowman did not contend the Government lacked a reasonable basis for the indictment, but instead argued the Government did not act quickly enough to dismiss the charges. To support his Hyde Amendment claim, Bowman sought an ex parte hearing. *See id.* (to decide whether or not to award fees or costs under the Hyde Amendment, "the court, for good cause shown, may receive evidence ex parte and in camera"). Along with his motions seeking fees and a hearing, Bowman presented exhibits including an Internal Revenue Service (IRS) interview from the Government's discovery file containing a physical description of the proper defendant that did not match Bowman's mug shot after his arrest, and statements by his codefendant's attorney that by July 2003, the codefendant had informed the Government that Bowman was not the person involved in the criminal activity. Bowman pointed out the warrant for his arrest did not contain a description, address, or other identifying information; he lived in Northern California and had no connection with the place identified by the Government informant as the proper defendant's place of residence in Southern California; and no search warrant was ever issued for his residence. The district court denied

a hearing and the request for fees, noting Bowman had waived his right to an identity hearing and the Government had taken reasonable and prompt steps to resolve the issue after Bowman raised the identity issue on July 18, 2003. Bowman appeals the denial of his Hyde Amendment claims, and we affirm.

Bowman first contends the district court should have held an ex parte hearing before deciding his Hyde Amendment claim. Bowman seeks to learn from Government counsel and several DEA agents when they knew Bowman's identity was an issue. The district court held that Bowman failed to establish good cause for a hearing because, in light of Bowman's waiver of an identification hearing, it was unnecessary to determine if the government knew identity was an issue before July 18, 2003. In the district court's view, the waiver led the Government to believe it had indicted the correct person and, until put on notice by Bowman in July, the Government had no reason to look into the identification issue.

Given the discretionary language of the Hyde Amendment and the district court's unique familiarity with the litigation, we defer to a district court's Hyde Amendment rulings. *United States v. Beeks,* 266 F.3d 880, 883 (8th Cir. 2001) (per curiam). In this case, we simply cannot say the district court abused its discretion in concluding Bowman failed to show good cause warranting a hearing. *See id.* Although the Government's discovery file contained a description of the proper defendant in a three-year-old IRS interview, the description was not at total odds with Bowman's mug shot. Further, given Bowman's waiver of his personal appearance in Iowa, the prosecutor had not seen Bowman and had no reason to question his identity until July, when the prosecutor received Bowman's letter

and learned Bowman did not match a description given by the codefendant of the person involved in the criminal activity. The mere fact that the Government charged the wrong defendant without more does not establish good cause for an ex parte hearing, particularly as here, when Bowman asserts the only issue is when the Government knew it had the wrong person and its reasonableness afterwards, not that the government acted without a basis to believe the charge could not be proven.

Bowman also argued that if the district court did not grant an ex parte hearing, the district court should hold the record open until his codefendant's criminal matter was resolved, so the codefendant could state when he informed the DEA agent that Bowman was not the correct codefendant. The district court had no reason to allow a fishing expedition, however. Bowman had no idea what the codefendant would say, and the codefendant's attorney did not give the conflicting description of the proper defendant to Bowman's attorney until July.

Aside from the district court's refusal to grant a hearing, Bowman also contends the district court abused its discretion in declining to award fees under the Hyde Amendment. Bowman contends the Government's prosecution of him was frivolous, a term that is not defined in the statute. We have stated a position is frivolous for the purposes of the Hyde Amendment when the position is utterly without foundation in law or fact. *Beeks,* 266 F.3d at 883-84; *see United States v. Knott,* 256 F.3d 20, 29-30 (1st Cir. 2001) (distinguishing the terms "vexatious" and "frivolous" in Hyde Amendment; for frivolousness, no improper motive need be shown); *United States v. Heavrin,* 330 F.3d 723, 729 (6th Cir. 2003) (same); *United States v. Sherburne,* 249 F.3d 1121, 1126 n.4 (9th Cir. 2001) (same).

Thus, although the Hyde Amendment targets prosecutorial misconduct rather than prosecutorial mistake, *United States v. Braunstein,* 281 F.3d 982, 995 (9th Cir. 2002), we stated in *Beeks* that "a prosecution . . . so utterly without foundation in law or fact as to be frivolous" amounts to prosecutorial misconduct. *Beeks,* 266 F.3d at 883-84.

Here, we do not know whether the Government's case against Bowman was utterly without foundation in fact rendering it frivolous, *see Beeks,* 266 F.3d at 883-84, because Bowman has failed to show the prosecution was pursued without any reasonable foundation for the belief that the Government might prevail on the indictment. *See Heavrin,* 330 F.3d at 729; *Knott,* 256 F.3d at 29-30. We need not determine this issue, however, because Bowman's Hyde Amendment claim fails on another ground. To prevail on his Hyde Amendment claim, Bowman also has the burden to show there are no special circumstances making the award unjust. *Braunstein,* 281 F.3d at 994; *see United States v. Aisenberg,* 358 F.3d 1327, 1339 n.18 (11th Cir. 2004). Although the district court focused on whether the Government's conduct in prosecuting Bowman was frivolous, it is clear from the court's opinion that it believed a fee award would be unjust in this case. The court observed that when Bowman finally gave the Government notice in July that he was the wrong defendant, the Government acted reasonably in investigating the matter and dismissing the charges against Bowman before trial. We agree. Until Bowman first questioned his identification in a July letter, and brought evidence that the Government had charged the wrong person to the prosecutor's attention in July and August, the Government was justified in relying on Bowman's waiver of the identification issue at his initial appearance before a

magistrate following his arrest in California. Once put on notice by Bowman, the Government took Bowman's claim seriously, confirmed Bowman was the wrong defendant, and asked the district court to dismiss the case. Given that Bowman did not bring the identity issue to the attention of the Government until more than four months after his arrest, and the case was dismissed after an investigation revealed the Government had indeed charged the wrong person, it would be unjust to hold the Government responsible for the payment of fees that would have been avoided if Bowman had put the Government on notice of its mistake sooner.

Because we conclude the district court did not abuse its broad discretion in denying Bowman's Hyde Amendment claim, *see Beeks,* 266 F.3d at 883, we affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)
Plaintiff,	) CRIMINAL NO. 03-40
vs.	) ORDER
LAWRENCE C. BOWMAN,	) (Filed Dec. 1, 2003)
Defendant.	)

The Court has before it defendant's application for attorney fees and costs, filed October 23, 2003. Plaintiff resisted on October 30, 2003. Defendant filed a reply memorandum on November 6, 2003. Plaintiff filed a memorandum in response on November 17, 2003 and defendant filed another reply memorandum on November 25, 2003. The motions are now fully submitted.

I. BACKGROUND

In February 2003, a grand jury returned an indictment against Lawrence Charles Bowman and an arrest warrant was issued. The arrest warrant did not describe defendant, nor did it provide any identifying information except his name. In March 2003, an individual named Lawrence C. Bowman was arrested in Sacramento, California. Defendant Lawrence C. Bowman initially appeared before a United States Magistrate Judge for the Eastern District of California, and waived his right to an identification hearing. He was subsequently released on his own recognizance. Defendant was directed to report to the Southern District of Iowa for arraignment on March 10,

2003. Instead of personally appearing, defendant filed a written appearance in California.

In a letter dated July 18, 2003, counsel for defendant requested photographs that would support the government's position that defendant was the same Lawrence Charles Bowman charged in the indictment. Defendant's Notice of Alibi was served on the government on August 19, 2003. In another letter dated August 22, 2003, counsel for defendant asked the government to drop the charges against his client.

After the issue of identity was raised, the government conducted further investigation and concluded that the present defendant was not the individual involved in the case. In a letter dated September 24, 2003, the government notified counsel for defendant of its intent to drop the charges, and subsequently asked the Court to dismiss the indictment. On October 1, 2003, the Court entered an order dismissing the charges against defendant.

II. APPLICABLE LAW AND DISCUSSION

A. Attorneys Fees, Costs and Expenses

The Hyde Amendment authorizes the Court to award reasonable attorneys fees and costs to the prevailing party in a criminal case where the Court finds that the government's position was "vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C. § 3006A. As noted by the District Court for the District of Columbia, the Hyde Amendment applies to cases where "Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously

wrong." *U.S. v. Wade*, 93 F. Supp. 2d 19, 22, (D.D.C. 2000) (internal citation omitted).

In the present case, defendant alleges that the government's prosecution was frivolous.[1] Defendant argues that at all times subsequent to defendant's arrest the government, through the Drug Enforcement Agency ("DEA") and later through its counsel, had evidence that defendant was not the Lawrence C. Bowman charged in the indictment. Defendant contends that his physical description does not fit the description of the intended suspect as described in a June 2000 IRS interview. Defendant also believes that his co-defendant, who cooperated with the government, alerted the DEA in the spring of 2003 that the defendant was not the same Lawrence C. Bowman involved in the alleged illegal activity. Moreover, defendant alleges that in July 2003, counsel for the co-defendant specifically told the DEA that they had the wrong Lawrence C. Bowman.

Defendant further claims the government's failure to investigate the aforementioned evidence gives weight to his frivolous prosecution claim. Defendant claims that the government knew of the identity problem as early as the spring of 2003. Defendant argues that in light of exculpatory evidence allegedly in possession of the government since the spring of 2003, the government's failure to

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[1] Because neither the Hyde Amendment nor the Eighth Circuit has defined "frivolous", the words will be given their ordinary meaning. *See U.S. v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999). Black's Law Dictionary defines a "frivolous action" as one that is "[g]roundless . . . with little prospect of success; often brought to embarrass or annoy the defendant." BLACK'S LAW DICTIONARY (6th ed. 1990).

dismiss the case until September 2003, less than one week prior to trial, amounts to a frivolous prosecution.

This Court disagrees. As noted by the government, at the time of defendant's arrest the DEA had a reasonable basis for believing that defendant was the same Lawrence C. Bowman charged in the indictment. Defendant had the same name as the person as the charged in the indictment, and both persons were living in Southern California. More importantly, defendant chose to waive his right to an identification hearing at his initial appearance. Government's Memorandum, Exhibit 1. As the government notes, defendant had ample opportunity to raise the identity issue at the early stages of the proceedings, but chose not do so until several months after his arrest.

The government first received a notice of alibi defenses from defendant on August 18, 2003. Government's Memorandum, Exhibit 2. The government argues that upon learning that identity was an issue, it took reasonable steps to conduct further investigation into Lawrence C. Bowman's social security number, employment history, physical description, residence and criminal background. When the government concluded that defendant was not the person charged in the indictment, it notified defendant of its intent to dismissed [sic] the case, on September 24, 2003.

B. Whether an Ex Parte Hearing is Required Under the Hyde Amendment

Defendant has requested the Court hold an ex parte hearing with counsel for the government and several DEA agents to determine when they knew identity of defendant was an issue. The Hyde Amendment provides that upon a

showing of good cause, the Court may receive evidence ex parte to determine whether to award fees and costs. 18 U.S.C. § 3006A. The meaning of the provision in the Hyde Amendment that allows the Court to receive evidence ex parte, however, is ambiguous. Interpretation by district and appellate courts have varied. *See, e.g., U.S. v. Gardner*, 23 F. Supp. 2d 1283 (N.D. Okla. 1998) (finding that the court has the discretion to receive ex parte evidence under the Hyde Amendment); *U.S. v. Truesdale*, 211 F.3d 898 (5th Cir. 2000) (suggesting that the Hyde Amendment's ex parte review provision is likely intended as a defense mechanism to help the prosecution rebut a request for fees, not as a discovery provision for the defense).

In the present case, even assuming that the Hyde Amendment permits discovery, defendant has failed to establish good cause for the Court to conduct an ex parte hearing. In light of defendant's waiver of an identification hearing, the Court finds it unnecessary to conduct an ex parte hearing to determine if the government knew that identity was an issue prior to it being raised by defendant on July 18, 2003. Accordingly, defendant's request that the Court hold an ex parte hearing with counsel for the government and the requested DEA agents is denied.

C. Conclusion.

As previously noted, defendant waived his right to an identification hearing at his initial appearance on March 6, 2003. One would expect an innocent party to raise the issue of identity at the earliest possible opportunity by suggesting to the court that the government arrested the wrong person. Instead, defendant chose to wait until July 18, 2003 before raising the issue. Under the circumstances, it was

not unreasonable for the government to operate with the belief that defendant was the same Lawrence C. Bowman charged in the indictment. When defendant did finally suggest that he was the wrong Lawrence C. Bowman, the government acted reasonably in investigating the matter and dismissing the charges against defendant prior to trial. Under the circumstances, the Court finds that the government's mistake does not rise to the level of a frivolous prosecution. Accordingly, defendant's request for attorneys fees and cost is denied.

III. ORDER

For the reasons outline above, defendant's October 23, 2003 request for attorney fees, costs and expenses is DENIED. Defendant's request that the Court conduct an ex parte hearing is DENIED.

IT IS ORDERED.

This 1st day of December, 2003.

/s/ Ronald L. Longstaff
RONALD L. LONGSTAFF,
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOURTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	)	
Plaintiff,	)	CRIMINAL NO. 03-40
vs.	)	ORDER
LAWRENCE C. BOWMAN,	)	(Filed Dec. 11, 2003)
Defendant.	)	

The Court has before it defendant's Motion to Reconsider and Amend Court's Ruling on Attorney Fees, filed December 10, 2003. The Court erred in indicating that defendant lived in Southern California. As defendant points out, he lived in Willows, which is located in Northern California. This does little, however, to change the Court's analysis of defendant's request for attorney fees. Moreover, defendant's assertion that the government was aware that identity was an issue prior to defendant's July 18, 2003 letter was already raised by defendant and considered by the Court in its December 1, 2003 order. Accordingly, Court declines to revisit its earlier ruling denying defendant's request for attorney fees and expenses.

IT IS ORDERED.

This 11th day of December, 2003.

/s/ Ronald L. Longstaff
RONALD L. LONGSTAFF,
Chief Judge
United States District Court

APPENDIX D

PARRISH KRUIDENIER MOSS DUNN
BOLES GRIBBLE & COOK, L.L.P.
LAWYERS **[Names Omitted In Printing]**

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(515) 284-5737 • (800) 532-1405 • FAX (515) 284-1704 •
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OFFICES ALSO LOCATED IN CEDAR RAPIDS, IOWA

July 18, 2003
VIA FACSIMILE 284-6281

Mr. Lester Paff
Assistant United States Attorney
United States Attorney's Office
110 East Court Avenue
Des Moines, Iowa 50309

RE: *United States of America v. Alan Bruce Clute, Smokey Mountain Trading Co., and Lawrence Charles Bowman*
Criminal No. 03-40
Our File No. A-03-56

Dear Mr. Paff:

We have reviewed the discovery in the Bowman file. It appears that there is insufficient evidence to establish that my client, Larry Bowman, is the same individual in question with regard to the criminal activity outlined in the indictment. If you have other information that supports your identification in this matter, I would certainly appreciate receiving it.

Further, if you have any photographs of any type that supports your position, I would like to review it.

Thank you for your continued cooperation and I look forward to hearing from you soon.

Do you know if this case is going to go to trial on August 4, 2003? My client has a conflict since he is due at a hearing involving a family matter in California on August 6, 2003. It is a very urgent matter, and we would like to see if we could change the trial date to accommodate his California hearing.

Thank you for your cooperation, and I look forward to hearing from you.

Sincerely,

PARRISH KRUIDENIER MOSS DUNN
BOLES GRIBBLE & COOK, L.L.P.

BY: /s/ Alfredo Parrish
Alfredo Parish

AP/rd

cc: Larry Bowman

APPENDIX E

PARRISH KRUIDENIER MOSS DUNN
BOLES GRIBBLE & COOK, L.L.P.
LAWYERS **[Names Omitted In Printing]**

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OFFICES ALSO LOCATED IN CEDAR RAPIDS, IOWA

August 22, 2003

Mr. Lester Paff
Assistant United States Attorney
United States Attorney's Office
110 East Court Avenue
Des Moines, Iowa 50309

RE: *United States of America v. Alan Bruce Clute, Smokey Mountain Trading Co., and Lawrence Charles Bowman*
Criminal No. 03-40
Our File No. A-03-56

Dear Mr. Paff:

We talked last week concerning a resolution of Mr. Bowman's case. As I have indicated to you in the past, we believe the government has the wrong person indicted in this case. As a matter of fact, I spoke with the co-defendant's attorney from Michigan. It was the third time that he and I had spoken about this issue. I asked him for a description from his client of what Mr. Bowman looked like. The description does not in any way match my client, Mr. Larry Bowman. We have been able to document Mr. Bowman's whereabouts on each occasion when the government is alleging that he was engaged in illegal conduct.

It appears that we have established an alibi in nearly every instance except the one that occurred Christmas Eve of 1996. We are in the process of verifying that information and will be able to substantiate it by an affidavit or by testimony during trial.

I am asking the government to drop all charges against Mr. Bowman and that it be done immediately. He has made arrangements to travel from California to Iowa and be here on August 31, 2003. In preparing this case, he has gone through an inordinate amount of expenses and time. He is quite stressed by this since he was not the person who engaged in any of this illegal conduct.

Please review your file and let me know if you would like the photographs of Mr. Bowman in order that we can substantiate that he is not the same person who was in fact distributing drug paraphernalia around the United States.

Thank you so much for your attention to this matter and we would like this matter resolved by Monday, August 25, 2003.

PARRISH KRUIDENIER MOSS DUNN
BOLES GRIBBLE & COOK, L.L.P.

BY: /s/ Alfredo Parrish
Alfredo Parish

AP/rd

cc: Larry Bowman